KHOSHIM MALIM

v.

BANK KERJASAMA RAKYAT MALAYSIA BHD

HIGH COURT MALAYA, KUALA LUMPUR
MOHD ZAWAWI SALLEH J
[SUIT NO: D-22A-28-2011]
12 JULY 2011

BANKING: *Banker and customer - Breach of agreement - Bai Bithaman Ajil facility - Defendant acting as plaintiff's bank - Defendant released two sums to developer - Plaintiff alleged one of released sums caused breach of contract - Whether releasing of said amount constitutes a breach - Whether plaintiff allowed to terminate agreement*

CONTRACT*: Breach - Breach amounting to repudiation - Bai Bithaman Ajil facility - Defendant released two sums to developer - Plaintiff alleged one of released sums caused breach of contract - Whether releasing of said amount constitutes a breach - Whether plaintiff allowed to terminate agreement*

The plaintiff had entered into a sale and purchase agreement in May 2004 with the developer and proprietor for the purchase of one unit double storey house ('the property') in Gombak, Selangor, *via* a Manzili Facility on Bai Bithaman Ajil principle ('BBA Facility') granted by Bank Kerjasama Rakyat Malaysia Bhd ('the defendant'). The defendant had then released two sums of RM70,000 and RM24,640 to EON Bank Bhd as the developer's bank ('EON Bank') and to the developer respectively. The first payment was to redeem the property while the latter was for the first progressive payment. The plaintiff who had paid RM55,361.02 to the defendant had alleged that the property has since been abandoned. The plaintiff thus initiated this action, by relying on s. 40 of the Contracts Act 1950, with the following prayers, *inter alia* for (1) a declaration that the defendant was in breach of contract by making payment of RM70,000 to EON Bank, (2) a declaration that he was not liable for any payment and (3) that the defendant was to pay back the installment made by the plaintiff. The issues that arose were (i) whether the defendant's release of RM70,000 to EON Bank was, in fact, a breach and (ii) if the question was answered in the affirmative, whether the plaintiff has a right to terminate the agreements entered into between the parties.

Held (dismissing action with costs):

(1) In s. 40 of the Contracts Act 1950, the phrase 'in its entirety' was used to describe the extent of the breach. This meant that the party in default must have refused to perform or has disabled himself from performing the whole of his promise. There must be an absolute refusal to perform the contract which affects a vital part of the contract for it to constitute as a breach. (*Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* & *LSSC Development Sdn Bhd v. Thomas Iruthayam & Anor*). (paras 11 & 13)

(2) According to cl. 2(a) in the Property Purchase Agreement in the BBA facility, it was stipulated that the defendant was not only obliged to pay the purchase price of the property but also in accordance with 'other documents' related to the disbursement of the same. The term 'other documents' is wide enough to include the redemption statement issued by EON Bank to the defendant. Thus, the act of the defendant paying the redemption sum of RM70,000 was not a breach as they were allowed to do so under the agreement. (paras 20 & 22)

Case(s) referred to:

Alex Ting Kuang Kuo v. Credit Corporation (Malaysia) Bhd [2008] 6 CLJ 512 HC ***(dist)***

Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd [2010] 1 CLJ 269 FC ***(refd)***

Freeth v. Burr [1873-74] 9 CP 208 ***(refd)***

LSSC Development Sdn Bhd v. Thomas Iruthayam & Anor [2007] 2 CLJ 434 CA ***(refd)***

Mersey Steel & Iron Co Ltd v. Naylor, Benzon & Co [1884] 9 App Cas 434 ***(foll)***

Legislation referred to:

Contracts Act 1950, s. 40

Other source(s) referred to:

Cheshire and Fifoot, *Law of Contract*, 9th edn, p 568

Dr VK Agarwal, *Law Of Contract: Principles and Practice,* International Law Book Services, pp 252, 253

For the plaintiff - Azwan Ismail; M/s Azwan Ismail & Co
For the defendant - Mohd Zaim; M/s Hazli & Ihab

Reported by Baizura Abd Razak

JUDGMENT

Mohd Zawawi Salleh J:

Introduction

[1] This is my judgment in respect of the plaintiff's claims against the defendant. The hearing was preceded by way of submissions only. I heard no oral evidence. This was agreed by the parties' respective counsels.

[2] For ease of reference, I shall refer the parties as "En Khoshim" for the plaintiff and "Bank Rakyat" for the defendant.

Undisputed Facts

[3] By way of background, it is material to state the facts which gave rise to the present case. The undisputed facts are as follows:

(a) Encik Khoshim entered into a sale and purchase agreement dated 31 May 2004 ("S&P Agreement") with Platinum 88 Sdn Bhd ("the developer") and Daya Tenaga Muda Sdn Bhd ("the proprietor") for the purchase of one unit double storey terrace house distinguished as lot no. 863, Ukay Bistari, PH 1 held under master title H.S. (D) 27426, P.T. No. 14325 and H.S. (D) 27427 P.T. No. 14326, Ulu Kelang, Gombak, Selangor Darul Ehsan ("the property") at RM246,400.

(b) Bank Rakyat, at the request of En Khoshim, granted a Manzili Facility based on the *Bai Bithaman Ajil* principle amounting RM250,000 to finance the purchase of the said property by way of a letter of offer dated 22 June 2004 ("BBA Facility").

(c) A Property Purchase Agreement ("PPA"), a Property Sale Agreement ("PSA") and deed of assignment were subsequently entered between the parties on 27 July 2004.

(d) Bank Rakyat, through its solicitors, Messrs Khairil & Co, had released the following amounts in respect of the said property:

(i) RM70,000 to EON Bank Berhad ("EON Bank"), the developer's bank *via* letter dated 9 August 2004 to redeem the property; and

(ii) RM24,640 to the developer *via* letter dated 11 August 2004 for the 1st progressive payment.

(e) Since then, Bank Rakyat had made no further payment to the developer because there is no further claim put forth by the developer.

(f) As at the filing of this suit, En Khoshim had paid RM55,361.02 to Bank Rakyat but the property is alleged by En Khoshim as abandoned.

(g) Dissatisfied with the status of the property, Encik Khoshim brought this action for the following prayers:

(i) a declaration that Bank Rakyat is in breach of contract by making payment of RM70,000 to EON Bank;

(ii) a declaration that he is not liable for any payment under PPA/PSA;

(iii) that Bank Rakyat is required to pay back the installment of RM55,361.02 already made;

(iv) that Bank Rakyat is required to pay back the premium paid by him for Takaful Mortgage amounting RM3,600;

(v) interest at 8% per annum;

(vi) damages due the breach of contract and exemplary damages which are to be assessed by the court; and

(vii) costs.

Issues To Be Decided

[4] The issues to be decided are:

(a) whether Bank Rakyat's release of RM70,000 to EON Bank was in breach of PPA/PSA; and

(b) if question (a) is in the affirmative, whether En Khoshim has a right to terminate the agreements entered into between the parties.

Submissions By Learned Counsel For Encik Khoshim

[5] Learned counsel for Encik Khoshim contended that according to cl. 2(a) of PPA, Bank Rakyat could only disburse the BBA Facility in accordance with the manner and at the times specified in the S&P Agreement. Third Schedule of the S&P Agreement clearly stated that Bank Rakyat was only obliged to

pay EON Bank the sum of RM24,640 upon signing of the agreements. Therefore, pursuant to the letter dated 6 August 2004 issued by Messrs Khairil & Co, solicitors for Bank Rakyat, confirming the execution of the facility's agreements, the payment made by Bank Rakyat to EON Bank should not exceed the one stipulated under the Third Schedule. Should they fail, the said disbursement was unlawful and amounted to a breach of cl. 2(a) of PPA. Being that so, En Khoshim was no longer liable under the agreements entered by both parties and he is entitled under the law to terminate the same. Reliance was placed on s. 40 of the Contracts Act 1950.

Submissions By Learned Counsel For Bank Rakyat

[6] In countering to the arguments put forth by En Khoshim, learned counsel for Bank Rakyat submitted that the disbursement of RM70,000 to EON Bank was not in breach of any agreement in particular PPA. Clause 2(a) relied by En Khoshim, if read in full, allows such release. This was captured from the words "and such other documents related thereto". According to learned counsel, the amount was paid pursuant to the redemption statement issued by EON Bank dated 26 July 2004 ("redemption statement"). This was to enable Bank Rakyat to redeem the said property and make themselves secured in respect of the BBA facility granted.

Findings Of The Court

[7] With respect, this court is unable to agree with the submissions advanced by learned counsel for Encik Khoshim.

[8] To my mind, a breach of contract occurs when a party repudiates or fails to perform his obligation under a contract. Every breach of contract discharges the other party from his obligations and confers a right upon him to sue for the breach.

[9] My analysis of the provision of s. 40 of the Contracts Act 1950, relied by learned counsel for Encik Khoshim, reveals two situations under which the breach may entitle the innocent party to treat the contract as being discharged: (a) refusal to perform, and (b) disability to perform, before the due time of performance or during the course of his performance (see Cheshire and Fifoot, *Law of Contract* (9th edn), p. 568 and Dr VK Agarwal, *Law Of Contract: Principles and Practice, International Law Book Services*, pp 252 and 253).

[10] For ease of reference, the said provision is reproduced herein:

> **40. Effect of refusal to party to perform promise wholly.**
>
> When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promise may put an end to the contract, unless he has signified, by words or conduct, his acquiescence, in its continuance.

[11] Notice should be taken that s. 40 uses the phrases "in its entirety" to describe the extent of the breach. It means, the party in default must have refused to perform or has disabled himself from performing the whole of his promise. If there is part performance by the defaulting party, the innocent party may not put an end to the contract (see *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269 FC).

[12] In *LSSC Development Sdn Bhd v Thomas Iruthayam & Anor* [2007] 2 CLJ 434, Gopal Sri Ram JCA (as he then was), had this to say:

> Notice that s. 40 uses the phrases "in its entirety" to describe the extent of the breach. So, the contract breaker must have "refused to perform … **his promise in its entirety**" before "the promisee may put an end to the contract". This is reproduction of the common law. To re-call, at common law:
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> > Where the event resulting from the failure by one party to perform a primary obligation has the effect of depriving the other party of substantially the whole benefit which was the intention of the parties that he should obtain from the contract, the party not in default may elect to put an end to all primary obligations of both parties remaining unperformed. See, **Photo Productions**, per Lord Diplock. (emphasis added)

[13] Therefore, there must be an absolute refusal to perform the contract which affects a vital part of the contract and leads the promise in not getting in substance what he bargained for.

[14] Now, going back to the crux of the dispute before this court. In this instant case, it was conceded by both parties that the facility involved in respect of the said property was the BBA Facility. For that reason, there were two separate transactions and agreements executed. Firstly, by way of PPA, Bank Rakyat purchased the property from Encik Khoshim who was the

beneficial owner of the same at RM250,000. This purchase price will be paid by Bank Rakyat in accordance with cl. 2(a) of PPA. Secondly, *via* PSA, Encik Khoshim then purchased the property back from Bank Rakyat at RM648,032.13 payable on deferred terms. The dispute ensued when Bank Rakyat disbursed RM70,000 to EON Bank to redeem the property which alleged by Encik Khoshim, had contravened cl. 2(a) of PPA.

[15] The real matter for this court's consideration is whether the act or conduct of Bank Rakyat in disbursing the sum of RM70,000 amounts to an intimation of an intention to abandon and altogether to refuse performance of PPA which justifies Encik Khoshim to repudiate the contract.

[16] Keating J in *Freeth v. Burr* [1873-74] 9 CP 208, had this to say at p. 214:

> It is not a mere refusal or omission of one of the contracting parties to do something which he ought to do that will justify the other in repudiating the contract; but there must be an absolute refusal to perform his part of the contract. Non-payment is an element.

[17] In *Mersey Steel & Iron Co Ltd v. Naylor, Benzon & Co* [1884] 9 App Cas 434; [1881-5] All ER Rep 365, Lord Blackburn said (at p. 443):

> The rule of law, as I always understood it, is that where there is a contract in which there are two parties, each side having to do something, if you see that the failure to perform one part of it goes to the root of the contract, goes to the foundation of the whole, it is a good defence to say, 'I am not going on to perform my part of it when that which is the root of the whole and the substantial consideration for my performance is defeated by your misconduct.

[18] I am now reproducing cl. 2(a) of PPA in full as follows:

> The Facility **shall be paid** by the Bank to the Vendor/Proprietor **in the manner and at the times specified in the S&P Agreement and such other documents related thereto** and subject to the terms and conditions contained therein. The payment of the Facility by the Bank to the Vendor/Proprietor in the manner set out herein shall be deemed to be effective payment thereof to or for the benefit of the Customers PROVIDED HOWEVER that the Bank shall not be bound to make payment of the Facility unless and until the monies owing by the Customers to the Vendor/Proprietor and referred to in Clause

A 2(b)(ii) hereof shall have been duly paid by the Customers to the Vendor/Proprietor AND PROVIDED FURTHER THAT the conditions precedent for disbursement referred to in Clause 3 hereof shall have been fulfilled and complied with by the Customers. (emphasis added)

B **[19]** The relevant provisions in the S&P Agreement which concerns on the schedule of payments of the purchase price could be found in the Third Schedule as follows:

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Schedule Of Payment Of Purchase Price			
No	Installments Payable	%	Amount
1.	Immediately upon signing of this Agreement	10.00	24,640.00
D 2.	Within twenty one (21) working days after receipt by the purchaser of the vendor's written notice of the completion of:		
E	(a) the foundation and footing works of the said building	10.00	24,640.00
	(b) the reinforced ...		

F **[20]** Upon bare reading of the full version of cl. 2(a) of PPA, it clearly shows that Bank Rakyat is not only obliged to pay the purchase price of RM250,000 (BBA Facility) in compliance with S&P Agreement but also in accordance with other documents related to the disbursement of the same. The latter speaks of the G general type of documents as long as they relate to the release of the monies. The word is wide enough to include the redemption statement and letter of undertaking issued by EON Bank to Bank Rakyat dated 26 July 2004.

H **[21]** In this instant case, the land on which the property supposed to be built on was charged to EON Bank as security for the loan granted to the developer for a housing development known as "UKAY BISTARI". Mohd Khoshim was interested in the said project and entered into a S&P Agreement. It was I promised by the developer and the proprietor that, *inter alia*, the property shall be free from all encumbrances and shall be delivered

with vacant possession. It was further agreed that in the event the said land shall be encumbered to any bank and/or financial institution by the developer (in this case *EON Bank*), the developer shall authorize Mohd Khoshim or Bank Rakyat to pay such portion of the purchase price to release such portion of the loan equivalent to the amount of the redemption sum payable in respect of the said property directly to EON Bank and thereafter the balance of the purchase price to the developer in the manner and at the time prescribed in the Third Schedule (see cl(s) 2 and 3 of S&P Agreement).

[22] Thus, I see nothing wrong for Bank Rakyat to pay the redemption sum of RM70,000 pursuant to the redemption statement issued by EON Bank as they were allowed to do so under the S&P Agreement and had been agreed by both parties.

[23] It is pertinent to note that, in this instant case, it was Encik Khoshim who did apply for housing financing facility from Bank Rakyat. It is a standard banking operation that as a financier, Bank Rakyat should have required a redemption statement from EON Bank in order to pay the balance of the purchase price and redeem the title of the property which was constructed or being constructed at the material times by the developer. They also have to pay the said sum to get a disclaimer from EON Bank that the property will not be part of any foreclosure proceedings if the developer winds up. All of these were done not only to secure the interest of Bank Rakyat but also for the benefit of Encik Khoshim.

[24] The case *Alex Ting Kuang Kuo v. Credit Corporation (Malaysia) Bhd* [2008] 6 CLJ 512 referred by learned counsel for Encik Khoshim could be distinguished. In that case, the respective provisions were clearly different. There, it was stipulated in the loan agreement that the housing loan shall be released in the amount and at times specified only in the sale agreement. There was no further document should be relied by any party for such disbursement. Unfortunately, it is not our case here. Therefore, the advice for first release given by Bank Rakyat's solicitors *via* letter dated 6 August 2004 was duly complied by Bank Rakyat.

[25] On the foregoing reasons, this court fails to understand how the disbursement of RM70,000 to EON Bank tantamounts to a refusal on the part of Bank Rakyat to performance of its obligation in respect of payments of the BBA Facility under PPA. This court also fails to see how the said release could amount to a breach of contract on the part of Bank Rakyat.

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Conclusion

[26] For the grounds adumbrated above, it is my judgment that Encik Khoshim has failed in proving his case against Bank Rakyat. The case is dismissed with costs at RM5,000.

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